Supreme Court, U.S.
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No. 05-88

IN THE

Supreme Court of the United States

CORNELIUS COOPER, *et al.*,

Petitioners,

v.

SOUTHERN COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's rigorous analysis of Petitioners' evidence does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's denial of certification of an equitable relief-only class does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's application of the *McDonnell-Douglas* analytical framework does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent The Southern Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Georgia Power Company has the following parent corporation:

The Southern Company.

The Southern Company is the only publicly held company that owns 10% or more of Georgia Power Company's stock.

Respondent Southern Company Services, Inc. has the following parent corporation:

The Southern Company.

The Southern Company is the only publicly held company that owns 10% or more of Southern Company Services, Inc.'s stock.

Respondent Southern Company Energy Solutions, Inc. has the following parent corporation:

Southern Company Holdings, Inc.

No publicly held company owns 10% or more of Southern Company Energy Solutions, Inc.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities vii

Introduction 1

Statement of the Case 3

Reasons for Denying the Petition 8

I. The District Court's Denial of Class Certification is Reviewed for Abuse of Discretion 9

II. The District Court Properly Conducted a "Rigorous Analysis" of Petitioners' Evidence 10

A. The Decisions Below Are Entirely Consistent with Eisen and Falcon 10

1. The District Court Was Required to Evaluate Petitioners' Evidence to Determine Whether Petitioners Established Typicality and Commonality 10

Contents

Page

2. The Eleventh Circuit — Like Every Other Circuit — Expressly Prohibits District Courts from Deciding a Case's Merits at the Certification Stage 13

B. The Decisions Below Are Entirely Consistent with Bazemore 13

1. The Lower Courts Did Not "Disregard" Dr. Madden's Expert Report 13

2. The District Court Properly Found that Dr. Madden's Report Did Not Compare Similarly Situated Individuals 14

3. A Circuit Split Does Not Exist ... 16

a. This Court Declined to Review this Issue Last Term 16

b. Petitioners Erroneously Believe that They Have Only a Burden of Production 17

c. The District Court Did Not "Choose Sides" in a Battle of the Experts 19

Contents

Page

d. Petitioners' Non-Statistical Evidence Was Not Sufficient to Support Dr. Madden's Report .. 20

C. The Eleventh Circuit Does Not Apply Different Class Certification and Summary Judgment Standards in Discrimination Cases 20

III. The District Court Did Not Abuse Its Discretion in Declining to Certify an Equitable-Relief Only Class 21

A. Granting Petitioners' Perfunctory Requests for Injunctive and Declaratory Relief Would Have Been Ineffectual .. 21

B. The Named Petitioners Would Not Have Adequately Represented the Putative Class 22

C. Petitioners Completely Ignore the Lower Courts' Significant Seventh Amendment Concerns 23

D. A So-Called "Catch 22" Does Not Exist in the Eleventh Circuit 24

IV. Desert Palace Has No Impact on this Case ... 25

A. Petitioners Have Waived Their Argument that this is a Mixed-Motive Case 25

Contents

Page

B. Desert Palace Did Not Impact the McDonnell Douglas Framework 26

C. Adopting Petitioners' Proposed Analytical Framework Would Not Change the Outcome of this Case 27

D. No Circuit Court Has Found that Desert Palace Altered McDonnell Douglas ... 28

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Balderston v. Fairbanks Morse Engine Div. of Coltec Indus., 328 F.3d 309 (7th Cir. 2003) 16

Bazemore v. Friday, 478 U.S. 385 (1986) .. 13, 14, 15, 17

Bolander v. BP Oil Co., 128 Fed. Appx. 412 (6th Cir. 2005) 25

Bryant v. Aiken Regional Med. Centers, Inc., 333 F.3d 536 (4th Cir. 2003) 28

Califano v. Yamasaki, 442 U.S. 682 (1979) 9

Carter v. Univ. of Toledo, 349 F.3d 269 (6th Cir. 2003) 28

Cerutti v. BASF Corp., 349 F.3d 1055 (7th Cir. 2003) 28

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 10, 11

Desert Palace v. Costa, 539 U.S. 90 (2003) 2, 26, 27, 28, 29

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 10, 11, 12

Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004) 12

Cited Authorities

Page

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982) 11, 17, 20

Golden v. City of Columbus, 404 F.3d 950 (6th Cir. 2005) 17

Grosz v. The Boeing Co., No. 04-55428, 2005 WL 1515070 (9th Cir. June 28, 2005) 21

Hillstrom v. Best Western TLC Hotel, No. 03-1972, 2003 WL 23095252 (1st Cir. Dec. 31, 2003) ... 28

Hilton v. Wyman-Gordon Co., 624 F.2d 379 (1st Cir. 1980) 18

Johnson v. California, 125 S. Ct. 2410 (2005) 27

Jones v. Barnhart, 349 F.3d 1260 (10th Cir. 2003) .. 28

Keelan v. Majesco Software, Inc., 407 F.3d 332 (5th Cir. 2005) 29

Kern v. TXO Prod. Corp., 738 F.2d 968 (8th Cir. 1984) 9

Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539 (D. S.C. 2000) 20

Love v. Turlington, 733 F.2d 1562 (11th Cir. 1984) 11, 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Cited Authorities

Page

Minority Employees of the Tennessee Dept. of Employment Security, 878 F.2d 1436, No. 88-5429, 1989 WL 74523 (6th Cir. July 10, 1989) 18

Morgan v. United Parcel Service of America, 380 F.3d 459 (8th Cir. 2004), *cert denied*, 125 S. Ct. 1933 (U.S. Apr. 25, 2005) 16, 17

Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458 (9th Cir. 1987) 17, 18

Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981) 23

Peterson v. Hewlett-Packard Co., No. 01-35795, 2004 WL 26580 (9th Cir. Jan. 6, 2004) 28

Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) ... 19

Porter v. Natsios, 414 F.3d 13 (D.C. Cir. 2005) ... 28

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) .. 27

Read v. BT Alex Brown, Inc., 72 Fed. Appx. 112 (5th Cir. 2003) 28

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 9

Ross v. Bernhard, 396 U.S. 531 (1970) 24

Salis v. University of Minnesota, 408 F.3d 470 (8th Cir. 2005) 25

Cited Authorities

Page

Sheehan v. Purolator, Inc., 839 F.2d 99 (2d Cir. 1988) 18

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005) 28

Taylor v. Cherry Hill Bd. Of Educ., No. 02-3738, 2004 WL 52083 (3rd Cir. Jan. 13, 2004) 28

Terry v. Ashcroft, 336 F.3d 128 (2nd Cir. 2003) ... 28

Trammel v. Simmons First Bank, 345 F.3d 611 (8th Cir. 2003) 28

United States v. Bean, 537 U.S. 71 (2002) 25

Zachary v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230 (W.D. Tex. 1999) 22

OTHER AUTHORITIES

42 U.S.C. § 2000e-2(m) 25, 26

Fed. R. App. P. 35(a)(1) 20-21

Fed. R. Civ. Proc. 23 ..... *passim*

Sup. Ct. R. 10 ..... 1, 9

U.S. Const. amend VII 2, 24

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's November 10, 2004 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners (who only make half-hearted attempts to demonstrate that a Circuit split exists) have not even carried their significantly less strenuous burden of showing that the District Court's denial of class certification was an abuse of discretion — which would, in any event, constitute insufficient grounds to grant the Petition. *See id.* Therefore, the Petition should be denied.

At the outset, Petitioners contend that the Eleventh Circuit's Opinion creates a Circuit split because it allows district courts to rule on the merits of a case at the class certification stage. This argument, however, is belied by the plain language of the Eleventh Circuit's Opinion *in this case*: "a trial court may not properly reach the merits of a claim when determining whether class certification in warranted . . ." Thus, the Eleventh Circuit — like every other Circuit — prohibits district courts from deciding the merits of a case at the class certification stage.

Petitioners also claim that the Eleventh Circuit's Opinion creates a Circuit split because it permits courts to deny class certification, despite the existence of an "admissible, methodologically valid regression analysis." No Circuit, however, has adopted Petitioners' erroneous belief that they have only a burden of production (not persuasion) at the certification stage. Indeed, the First, Second, Sixth, and Ninth Circuits — whose decisions Petitioners claim are in conflict with the law of the Eleventh Circuit — have all found that *admissible* statistics may be *insufficient* to satisfy the plaintiffs' burden of persuasion at the certification or merits stages.

Further, Petitioners' contention that the district court should have certified an "equitable relief only class" is not properly before this Court because Petitioners never actually dismissed their claims for compensatory and punitive damages. Regardless, Petitioners — who merely made generic, perfunctory requests for injunctive relief — would have been inadequate representatives of the putative class because the members of the class would have been precluded from recovering compensatory and punitive damages in the event the District Court had certified Petitioners' claims for equitable relief-only. Moreover, Petitioners have made no effort to address the concerns of both of the courts below that certifying an equitable relief-only class would have likely run afoul of the Seventh Amendment to the United States Constitution.

Finally, Petitioners' far-fetched contention that this Court's decision in *Desert Palace* overruled its seminal decision in *McDonnell Douglas* is utterly without merit. This Court did not even *mention McDonnell Douglas* in *Desert Palace*, and it has continued to rely on the *McDonnell Douglas* analytical framework since *Desert Palace* was decided. Moreover, no Circuit Court has held that *Desert Palace* abrogated *McDonnell Douglas*, and the vast majority of district courts have held that *Desert Palace* did not impact *McDonnell Douglas* in any way. Therefore, this is essentially a "settled" issue that does not merit this Court's attention. Even if this Court were inclined to address this issue, this case does not present such an opportunity because Petitioners never proffered a shred of evidence that race was a motivating factor in any of the employment decisions at issue.

Simply put, Petitioners have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

The three different companies involved in this case — GPC, SCS and SCES (the "Companies" or the "Respondents") — conduct an extremely wide variety of operations and functions at more than 200 different locations in several different states to serve customers in the electric utility industry.[1] (R136 V.3 Tab 27: 9-28). The Companies employ individuals in a wide variety of positions, ranging from entry-level, non-skilled laborer positions to upper-level management. (Pet. App. at 297a-298a). The Companies employ exempt and non-exempt employees, supervisory and non-supervisory employees, and employees whose pay and other terms and conditions of employment are strictly governed by a collective bargaining agreement ("CBA") with a union. (Pet. App. at 297a-298a). The wide disparity among the Companies and their myriad employees are well documented in the record. (*See* Pet. App. at 6a ("the differences in management structures, working environments, and criteria for employment decisions vary substantially among the defendant companies")).

Even *within* each of the Companies, the employment structures vary significantly. For instance, with respect to GPC, the Eleventh Circuit observed that:

> GPC's operations are extremely diversified, and its facilities, workforce, and management are dispersed across the entire state of Georgia. Certain functions within GPC are divided among different regions in the state, and widely divergent operating and management structures exist within different regions. Thus, for example, GPC's Customer Operations function across 16 regions that have very different workforces. The expansive and rural Southeast Region has very different characteristics with respect to technology, customer service, and distribution capacity than does the

1. The Southern Company is a holding company which has no employees. (Pet. App. at 296a).

> metropolitan Atlanta region, a dense and highly-populated area that includes numerous commercial clients.

(Pet. App. 5a). Simply put, "the workforces within the different Companies are strikingly different." (Pet. App. at 7a). Petitioners have not challenged these facts at any stage of this case.

Despite these significant variations between (and within) the Companies, Petitioners have attempted to portray decision-making on personnel matters at the Companies as "common pay and promotion polices" that can be challenged on a class-wide basis.[2] (*See* Pet. App. at 4). In actuality, there are a number of different types of employment decisions at issue, and the Companies employ a variety of different processes and procedures to make these employment decisions. (*See* Pet App. at 7a). For example, in the area of compensation, pay rates and other terms of compensation for union positions are dictated exclusively by the CBA, so managers have no discretion in setting those wages. (Pet. App. at 7a). In some business units, employees whose jobs are not covered by a CBA are compensated under special compensation and bonus plans that are unique to their business units. (R136 V.3 Tab 38: ¶ 34). Other employees are eligible for merit increases and incentive bonuses each year, but managers in different business units at different companies use different processes to make those decisions. (R135: 16-19).[3] There are also a wide variety of

2. Specifically, Petitioners allege that there are "common promotion and compensation policies and practices, which give managers unfettered discretion to make subjective, non-job-related decisions, foster a pattern or practice of discrimination or have a disparate impact on black employees." (*See* Pet. App. at 4).

3. For instance, some managers allocate the same percentage merit increases to all employees — except those whose performance is extraordinarily good or bad. (R136 V.3 Tab 30: ¶ 19). Some managers rate and rank employees, then develop merit raise clusters and assign the same percentage increases to each cluster. (R136 V.4 Tab 60: ¶ 30). (Cont'd)

different approaches used to determine incentive pay awards. (R135: 18-19).

With respect to promotion decisions, there are a number of different types of promotions available to employees. (R135: 11-16). For instance, there are competitive promotions in which a job is posted on an electronic computer system (which is available to all employees) and candidates compete for the posted job through competitive interviews. (R136 V.3 Tab 31: ¶ 8; Tab 36: ¶ 9; Tab 41: ¶ 20; Tab 43: ¶¶ 12-13; Tab 45: ¶ 15; Tab 47: ¶ 13). There are job vacancies under the CBA that are filled via seniority under the provisions of the CBA. (R136 V.1 Tab 20: ¶¶ 7-8). There are "progressive" promotions, in which an employee is advanced within the same salary grade on a non-competitive basis when he or she accomplishes certain pre-determined goals or milestones associated with the job family (or he or she demonstrates satisfactory performance over a sustained period). (Pet. App. at 301a). Jobs are also sometimes filled through developmental moves, job rotations and reorganizations. (R135: 15-16).

While decisions are made by different managers in different departments using different methods,[4] the Companies have implemented a number of policies and procedures to help managers make sound decisions based on job-related factors. (Pet. App. at 8a). For example, discrimination on the basis of race (or any other protected class) is strictly prohibited at the

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(Cont'd)

Other managers focus on achievement of departmental goals and individual goals, as well as their organization's pay philosophy (which varies from organization to organization). (R136 V.3 Tab 42: ¶ 17).

4. For non-unionized workers, "hiring and promotion decisions are made by managers of various rank based in geographically dispersed facilities within each of the defendant companies. Different managers assign various weights to different qualifications in making their employment decisions, and managers have the discretion to utilize a wide range of processes and procedures when making compensation and promotion decisions." (Pet. App. at 7a).

Companies. (R136 V.3 Tab 27:2-6 and Exs. A-G). The Companies also go to great lengths to "promote compliance with all EEO policies and anti-discrimination laws" and to "address workforce diversity." (*See* Pet. App. at 9a) (describing various measures the Companies have implemented, such as affirmative action plans and training programs)). In addition, managers are provided with tools and resources to use in making promotion and compensation decisions based on legitimate, non-discriminatory factors.[5] In sum, there are no "common promotion and compensation policies and practices" that "foster a pattern or practice of race discrimination or have a disparate impact on black employees." (Pet. App. at 4).

Despite these facts, on July 27, 2000, Petitioners filed suit against Respondents, alleging that the Companies unlawfully discriminated against all of their African-American employees on account of their race.[6] (Pet. App. at 2a). Petitioners alleged

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5. Human Resources personnel provide substantial guidance and tools for managers to use in filling job vacancies and determining employees' compensation. For instance, managers are provided with Structured Interview Guidelines (which contain a list of proposed job-related questions for each behavioral trait required for the job and tools for evaluating responses to those questions) and HR representatives frequently facilitate the meetings of job selection committees. (R135: 11-16). Similarly, managers receive general guidance from the Compensation Department and senior management regarding how to set salaries, merit increases and bonuses for non-covered employees. For instance, absent very unusual circumstances, managers are instructed that an employee's salary should fall within 80% to 120% of the midpoint of the salary range for his or her job grade. (R135: 16-19).

6. In the Petition, Petitioners try to support their claims by cites to purported evidence that is taken completely out of context. This "evidence" includes such things as a diversity scorecard document, testimony of a low level, former human resources employee and some vague, non-specific affidavits, purportedly containing anecdotal evidence of discrimination. (*See* Pet. App. at 4-6). When the Court views this evidence in context, none of the evidence remotely supports Petitioners' claims. (*See, e.g.*, R135: 28-29, 30 n. 17, 59 n. 40; R136 V. 1, Tab 18).

that Respondents discriminated against them in connection with promotion opportunities and performance evaluations, as well as in terms of compensation. (Pet. App. at 3a). Petitioners sought to represent a Rule 23 class that they described in the following terms:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices.

In the Eleventh Circuit's view, this was a "very broad class" which "included approximately 2,400 individuals residing in Georgia, Alabama, Florida, and Mississippi, and working at locations dispersed throughout the four states." (Pet. App. at 3a, 28a). Indeed, the class encompassed all types of employees ranging from entry-level manual laborers to skilled professionals, exempt and non-exempt employees, and unionized and non-unionized workers. (Pet. App. 3a).

After extensive discovery was conducted, the District Court denied Petitioners' Motion for Class Certification. Specifically, the District Court found that Petitioners had not satisfied three of the four basic requirements of Federal Rule of Civil Procedure 23(a).[7] (Pet. App. at 324a-326a, 366a-367a). Alternatively, the

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7. Rule 23(a) provides that,

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of

(Cont'd)

District Court held that Petitioners failed to establish that certification was appropriate under Rule 23(b)(2) or (b)(3).[8] (Pet. App. at 372a, 376a-377a). The District Court subsequently granted Respondents' Motions for Summary Judgment as to each individual claim raised by each of the named Petitioners. (Pet. App. at 2a). The Eleventh Circuit affirmed the District Court's judgments in all respects. (Pet. App. at 2a).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly,

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(Cont'd)

> the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These four requirements are referred to as numerosity, commonality, typicality, and adequacy.

8. Rule 23(b) provides in pertinent part, that:

> [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. *The District Court's Denial of Class Certification is Reviewed for Abuse of Discretion*

District courts "have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of . . . class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). As a result, the denial of class certification is reviewed for abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). This highly deferential standard of review allows "a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." (Pet. App. at 21a.); *see Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse-of-discretion review "presupposes a zone of choice within which the trial courts may go either way"). Accordingly, even if this Court would have certified a class, "that does not mean the district court abused its discretion in declining to do so." (Pet. App. at 21a). While the denial of certification is reviewed for abuse of discretion, Petitioners must also carry their significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioners have not carried their burden because this is simply an unremarkable case in which the District Court exercised its considerable discretion under Rule 23 not to certify a class.

II. *The District Court Properly Conducted a "Rigorous Analysis" of Petitioners' Evidence*

A. The Decisions Below Are Entirely Consistent with *Eisen* and *Falcon*

1. *The District Court Was Required to Evaluate Petitioners' Evidence to Determine Whether Petitioners Established Typicality and Commonality*

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), this Court held that the district court had erred by holding a preliminary hearing on the merits of the plaintiff's claims at the class certification stage, because "[n]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Petitioners contend that the District Court violated *Eisen* by "requiring Plaintiffs to 'convince the Court' of the merits of their case at the class certification stage."[9] (*See* Pet App. 7-9).

Petitioners' invocation of *Eisen*, however, is simply a desperate attempt to divert this Court's attention from this Court's post-*Eisen* explanation that evidence pertaining to Rule 23's requirements is often intertwined with the merits, "making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." (*See* Pet. App. at 22a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 12 (1978) ("evaluation of many of the questions entering into determination of class action questions is *intimately involved with the merits of the claims*")) (emphasis added)). In fact, four years after *Coopers & Lybrand* was decided, this Court held that district courts are *required* to conduct a "rigorous analysis" of the evidence to determine

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9. The Eleventh Circuit rejected Petitioners' contention that the District Court conducted a merits inquiry. (Pet App. at 22a-23a).

whether the plaintiffs have satisfied the elements of Rule 23(a). *See General Telephone Company of the Southwest v. Falcon* 457 U.S. 147, 161 (1982) ("a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied").[10]

In light of this Court's jurisprudence since *Eisen*, the Eleventh Circuit has cautioned that

> while it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements.

(*See* Pet. App. at 22a (quoting *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984))). Unfortunately, this is precisely the misguided strategy Petitioners advance in their Petition.

In this case, the District Court properly conducted a rigorous analysis of Petitioners' evidence for the sole purpose of determining whether Petitioners established commonality and typicality under Rule 23(a). (*See* Pet. App. at 323a-367a). Naturally, some of this evidence was intertwined with the evidence Petitioners would have used to prove the merits of their case. *See Coopers & Lybrand*, 437 U.S. at 469 n. 12. As the Eleventh Circuit reasoned, however, this was not an abuse of discretion — as the District Court was *required* to perform this analysis pursuant to *Falcon*:

> the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at

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10. Tellingly, Plaintiffs do not even *cite Falcon* — the seminal, "controlling case . . . interpreting Rule 23's requirement of commonality." (Pet. App. at 362a).

> the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class. Indeed, the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members.

(Pet. App. at 23a) (emphasis in original).

At best, Petitioners' argument amounts to an exercise in semantics. The District Court's mere use of the words "convince" and "establish" does not demonstrate that it conducted a merits inquiry. (*See* Pet. App. at 8; Pet. App. at 324a ("with respect to Named Plaintiffs Cooper, Green, McCullers and Wilson, the Court is *unconvinced* that they have claims typical of the class as a whole. No factual showing has been made in this regard")) (emphasis added). Moreover, Petitioners' inexplicable reliance on the following excerpt from the District Court's Order only serves to confirm that the Court ruled on the elements of Rule 23(a) — *not* the merits of Petitioners' claims: "it is important to focus on the relative strength and quality of that evidence to determine if it is *strong enough to provide the element of commonality needed for class certification.*" (*See* Pet. App. at 8 (quoting Pet. App. at 367a)) (emphasis added). Accordingly, Petitioners have not shown that the District Court's rigorous analysis of Petitioners' evidence was in error (let alone an abuse of discretion). *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("*Eisen*'s prohibition against assessing plaintiffs' likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits").

2. *The Eleventh Circuit — Like Every Other Circuit — Expressly Prohibits District Courts from Deciding a Case's Merits at the Certification Stage*

Petitioners erroneously claim that the Eleventh Circuit's decision conflicts with the law of the Second and Fourth Circuits, which prohibit district courts from making a merits determination at the certification stage. (*See* Pet. App. at 10). As demonstrated above, the Courts below did *not* inquire into the merits of Petitioners' claims, but rather they evaluated whether Petitioners had satisfied the requirements of Rule 23(a). (*See* Pet. App. at 26a-37a; 323a-367a). Indeed, this Court need look no further than the plain language of the Eleventh Circuit's Opinion *in this case* to determine that there is no Circuit split on this issue: "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. 22a) (emphasis added); *see also Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984). This is the unambiguous law of the Eleventh Circuit, which is in harmony with the law of this Court and all other Circuits.

B. The Decisions Below Are Entirely Consistent with *Bazemore*

1. *The Lower Courts Did Not "Disregard" Dr. Madden's Expert Report*

In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), this Court held that a statistical analysis should not be excluded from evidence merely because it fails to incorporate every possible variable. Petitioners repeatedly contend that the decisions below are in conflict with *Bazemore* because the Courts "disregarded" the expert report of Petitioners' expert Dr. Janice Madden. (*See* Pet. App. at 11-13). Petitioners' contention is a complete mischaracterization of the record. The District Court — which held that Dr. Madden's Report was *admissible* — spent *ten pages* conducting a painstaking, thorough analysis of Dr. Madden's Report. (*See* Pet. App. at 327a-337a). Specifically, the District

Court analyzed Dr. Madden's methodologies, her definitions, the factors she considered, and her conclusions — eventually determining that the Report was not sufficiently probative to establish that the named Petitioners had claims in common with other class members.[11] (Pet. App. at 327a-337a). The Eleventh Circuit spent six pages conducting an equally thorough analysis of the Report's probativeness. (*See* Pet. App. at 31a-36a). Thus, the analysis by the lower Courts is entirely consistent with *Bazemore*'s pronouncement that the "failure to include variables will affect the analysis' probativeness, not its admissibility." *See id.* at 400.

2. *The District Court Properly Found that Dr. Madden's Report Did Not Compare Similarly Situated Individuals*

Petitioners further contend that the decisions below "also conflict[ ] with *Bazemore* by disregarding Dr. Madden's Report based on speculation that some other variables *might* affect the analyses." (*See* Pet. App. 13) (emphasis in original). Again, this is a mischaracterization of the record. In actuality, the District Court determined that the variables Dr. Madden *actually considered* were flawed, and that, as a result, she "fail[ed] to adequately measure the promotion and compensation experiences of similarly situated employees." (*See* Pet. App. 333a).

Specifically, the District Court found that the Madden

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11. According to the Eleventh Circuit,

> [t]he district court did not exclude Dr. Madden's reports because she was unqualified or because the reports were based on a wholly unreliable methodology; rather, the court accepted the reports' conclusions but determined that they still failed to establish that the named plaintiffs had claims in common with other class members under either a pattern and practice or disparate impact theory.

(*See* Pet. App. 32a).

Report suffered from the following material flaws:[12] (i) Madden's definition of "experience" meant only the amount of time that had elapsed since finishing school and the amount of time the individual had been on Respondents' payroll — there was no consideration of such factors as type or level of acquired skills, "both of which are highly related to promotions and level of compensation"; (ii) Madden did not compare outcomes for employees who had *actually applied* for posted positions; (iii) Madden did not distinguish between competitive and progressive promotions; (iv) Madden's definition of "education" did not account for field of study, the relevance of that field to any position in question, or the quality of the educational institutions involved; and (v) Madden's analysis of promotions was not tailored to the decision-making process Respondents actually used. (Pet. App. at 333a-337a).

Likewise, the Eleventh Circuit found that Dr. Madden's Report contained numerous "substantial analytical flaws." (*See* Pet. App. at 30a). According to the Eleventh Circuit, "the Madden reports did not make any reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish *commonality* among these named plaintiffs' claims and the overall claims of the affected class." (*See* Pet. App. at 35a) (emphasis in original).

Because Dr. Madden did not compare similarly situated individuals, the District Court found that her Report was insufficient to demonstrate that the named Petitioners' claims were common to the class under either a disparate impact or a

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12. Petitioners' suggestion that Dr. Madden controlled for "more variables than this Court held were necessary in *Bazemore*" is immaterial because *Bazemore* dealt with the admissibility (not weight) of expert reports. (Pet. App. at 13); *Bazemore*, 478 U.S. at 400. Regardless, given that Dr. Madden failed to compare similarly situated individuals, the total number of variables that were supposedly included in her analysis is inconsequential.

disparate treatment theory.[13] (*See* Pet. App. 333a). Given the Report's "substantial analytical flaws", this finding was not an abuse of discretion. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 319-20 (7th Cir. 2003) ("[t]he Supreme Court has emphasized the importance of looking to the proper base 'group' when making statistical comparisons and examining all of the surrounding facts and circumstances which create the statistics themselves").

3. *A Circuit Split Does Not Exist*

Petitioners contend that the Eleventh Circuit's Opinion creates a Circuit split with the First, Second, Sixth, and Ninth Circuits on the ground that it impermissibly allows district courts "to choose sides in a battle of experts and to decide that Rule 23 is not satisfied based on a finding that an admissible, methodologically valid regression analysis does not provide sufficiently strong evidence of discrimination because the court speculates the analysis should have included additional variables." (*See* Pet. App. at 16). Petitioners' argument fails for the reasons discussed below.

a. *This Court Declined to Review this Issue Last Term*

Last term, this Court declined to review an Eight Circuit decision in which the plaintiffs' multiple regression analyses were deemed to be insufficient to create a triable case of pattern-or-practice discrimination because the regressions "fail[ed] to take into account past pay, performance, or both." *See Morgan v. United Parcel Service of America*, 380 F.3d 459, 468 (8th Cir. 2004), *cert denied*, 125 S. Ct. 1933, 161 L. Ed. 2d 773 (U.S. Apr. 25, 2005) (No. 04-1123). No significant legal

13. Even according to Dr. Madden's Report, only three of 148 pools she analyzed showed a representational deficiency of African-Americans. (Pet. App. 336a). The District Court concluded that this evidence may demonstrate that promotional deficiencies for African-Americans may have existed only in some segments of the workforce, not throughout the entire class. (Pet. App. 336a).

developments have taken place since this Court denied the Petition for a Writ of *Certiorari* in *Morgan*. Accordingly, the Petition should be denied for this reason alone.

b. *Petitioners Erroneously Believe that They Have Only a Burden of Production*

Petitioners' main complaint — *i.e.*, that the District Court was not permitted to deny certification once Petitioners presented an "admissible, methodologically valid regression analysis" — reveals a fundamental misunderstanding of *Bazemore*, *Falcon*, and ultimately, Rule 23. (Pet. App. at 16). Petitioners erroneously seem to believe that they have a burden of production (not persuasion) at the class certification stage. *See Falcon*, 457 U.S. at 156, 161 (plaintiffs have burden of satisfying Rule 23's prerequisites); *Golden v. City of Columbus*, 404 F.3d 950, 965 (6th Cir. 2005) ("[a]s the party seeking class certification, [the plaintiff] bears the burden of proof"). Petitioners were required to do significantly more than merely *produce* an admissible expert report. Indeed, Petitioners (through the use of statistics and other evidence) had the burden of *persuading* the Court that they satisfied the requirements of Rule 23(a).[14] (*See* Pet. App. 35a n. 11 (*Bazemore* "did not hold that any statistical report, no matter how many critical variables were missing, should automatically present a jury question . . .")); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987) ("[w]e note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs. The judge was

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14. Taken to its logical extreme, Petitioners' argument would have this Court hold that certification is *mandatory* whenever a plaintiff presents an admissible statistical analysis. (Pet. App. at 16). *Falcon*'s directive that district courts conduct a "rigorous analysis" of the evidence, however, completely undermines Petitioners' contention that the district court was bound to accept their allegations and statistical materials at face-value and thereby rubber-stamp their Motion for Class Certification. *See Falcon*, 457 U.S. at 161.

simply unpersuaded"). Petitioners did not satisfy their burden of persuasion.

Further, Petitioners' contention that the Eleventh Circuit's Opinion creates a Circuit split is incorrect because *no* Circuit has held that the plaintiff has only a burden of production at the certification stage. In fact, the First, Second, Sixth, and Ninth Circuits — whose decisions Petitioners claim are in conflict with the law of the Eleventh Circuit — have all found that *admissible* statistics were *insufficient* to satisfy the plaintiffs' burden of persuasion at the certification or merits stages. *See, e.g., Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 381-82 (1st Cir. 1980) (affirming judgment in favor of defendant as to plaintiffs' disparate treatment claims where admissible statistical evidence was "ambiguous"); *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 102 (2nd Cir. 1988) (affirming denial of class certification where district court determined that statistics "did not provide relevant comparisons of males and females with the same qualifications and experience, nor did the statistics alone indicate that other female employees felt aggrieved"); *Minority Employees of the Tennessee Dept. of Employment Security*, 878 F.2d 1436, No. 88-5429, 1989 WL 74523, *2-3 (6th Cir. July 10, 1989) (affirming dismissal of class action disparate impact claims where district court found "plaintiffs' statistical evidence failed to accurately reflect those employees interested in and qualified for promotion. Furthermore, plaintiffs' statistical evidence failed to indicate the racial composition of the pool of employees seeking placement on the promotional register and failed to restrict itself to actual applicants who were qualified for promotion"); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987)

> [t]he district court concluded that variables missing from the [statistical] model must have had a significant influence on salary and advancement decisions . . . [W]e hold that the district court did not clearly err in concluding that the plaintiffs failed to establish the

> existence of actionable discrimination by a preponderance of the evidence.

Therefore, it is clear that the Eleventh Circuit's Opinion does not create a Circuit split.[15]

c. *The District Court Did Not "Choose Sides" in a Battle of the Experts*

Finally, Petitioners' suggestion that the District Court "cho[se] sides in a battle of the experts" is yet another mischaracterization of the Court's Order. (*See* Pet. App. at 16). The District Court did not conduct a comparative analysis of the two reports nor did it determine that Dr. Haworth's Report was more persuasive or credible than Dr. Madden's. (*See* Pet. App. at 327a-337a); *see, e.g.*, *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) (reversing magistrate judge's grant of summary judgment where lower court "found [the defendant's expert's] conclusions *more credible*. This approach of weighing the credibility of the competing expert reports amounts to improper fact-finding") (emphasis added). Rather, the District Court simply determined that Dr. Madden's Report has "some limitations which undermine its usefulness in measuring whether Defendants' employment practices are racially neutral." (*See* Pet. App. at 333a). Indeed, the District Court observed that there were certain factors that likewise "limit[ed] the usefulness of Haworth's Report." (Pet. App. at 336a). Therefore, it is readily apparent that a battle of the experts did not take place. (*See* Pet App. at 14-15 (citing *Phillips*, 400 F.3d at 399)).

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15. Petitioners' contention that the District Court's summary judgment rulings "depended on" its supposed "rejection" of the statistical evidence is simply not true. The District Court held that even if Petitioners' statistics were sufficient to establish a statistically significant disparity, Petitioners still had not established the existence of a causal nexus between the disparity and a specific, facially neutral employment practice. (*See e.g.*, Pet. App. at 162a) Thus, Petitioners' claims would have been dismissed even if the Court had found the existence of a statistically significant disparity.

d. *Petitioners' Non-Statistical Evidence Was Not Sufficient to Support Dr. Madden's Report*

Even if the District Court somehow abused its discretion by not giving enough weight to Dr. Madden's Report (which it did not), the Petition still should be denied because the District Court found that the anecdotal evidence Petitioners presented — which is necessary to support even the most probative statistical evidence — likewise was not sufficient to establish commonality. (*See* Pet. App. at 337a-367a); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 553 (D. S.C. 2000) ("the Supreme Court in *Falcon* made clear that statistics alone were insufficient to carry the plaintiff's burden under a Rule 23(a) certification for 'pattern and practice' claims"). Petitioners do not claim that the District Court's analysis of their non-statistical evidence was flawed in any way. Therefore, the Petition should be denied for this additional reason.

C. The Eleventh Circuit Does Not Apply Different Class Certification and Summary Judgment Standards in Discrimination Cases

Petitioners claim that the Eleventh Circuit applies heightened requirements at the class certification stage in employment discrimination cases by requiring plaintiffs to prove the merits of their case. (*See* Pet. App. at 18-21). Petitioners' contention, however, is belied by the plain language of the Eleventh Circuit's Opinion in *this* case: "a trial court *may not properly reach the merits of a claim* when determining whether class certification in warranted . . ." (*See* Pet. App. at 22a) (emphasis added). Further, Petitioners have not even attempted to explain how the Eleventh Circuit's alleged heightened summary judgment standards impacted the dismissal of their individual claims. (*See* Pet. App. 20-21).

Even if those so-called double-standards exist (which they do not), it is the province of the Eleventh Circuit, not this Court, to remedy inconsistencies within its caselaw. *See* Fed. R. App.

P. 35(a)(1) (*en banc* rehearing may be granted by Court of Appeals if it is "necessary to secure or maintain uniformity of the court's decisions"). Accordingly, these alleged double-standards are both non-existent and immaterial.

III. *The District Court Did Not Abuse Its Discretion in Declining to Certify an Equitable-Relief Only Class*

There is no need for this Court to reach this issue because the District Court did not abuse its discretion in determining that Petitioners failed to satisfy the elements of Rule 23(a). *See* Fed. R. Civ. P. 23(b) (plaintiff must meet all four of the requirements of Rule 23(a) *and* at least one requirement of Rule 23(b)); *Grosz v. The Boeing Co.*, No. 04-55428, 2005 WL 1515070, *2 (9th Cir. June 28, 2005) ("[b]ecause we find that the requirements of Rule 23(a) are not met, we need not reach the question of whether the proposed class satisfies, in addition, one of the requirements of Rule 23(b)). Even if this Court is inclined to consider Petitioners' Rule 23(b)(2) argument, the Petition should be denied because Petitioners have not carried their burden of demonstrating that the District Court abused its discretion by declining to certify an equitable relief-only class.

A. Granting Petitioners' Perfunctory Requests for Injunctive and Declaratory Relief Would Have Been Ineffectual

Petitioners contend that the District Court abused its discretion by declining to certify "an equitable relief only class." (Pet. App. at 22-24). Petitioners, however, *never actually dismissed their claims for compensatory and punitive damages.* Therefore, Petitioners' contention merely presents a hypothetical scenario that is not properly before this Court.

Regardless, certifying an equitable relief-only class would have been ineffectual because Petitioners merely made generic, perfunctory requests for injunctive relief. Indeed, as the District Court observed: "Plaintiffs have given the Court little information as to what sort of injunctive or declaratory relief

would be of such clear importance as to warrant a determination that equitable issues predominate over the issues of damages." (Pet. App. at 370a; *see also* Pet. App. at 40a n. 13 ("the declaratory and injunctive relief plaintiffs seek amounts, in essence, to an order stating that the defendants discriminated against African-American employees, and enjoining them from discriminating in the future")). Accordingly, given that Petitioners failed to dismiss their claims for damages and they failed to even specify the injunctive relief they were seeking, it could not possibly have been an abuse of discretion for the District Court to decline to certify an equitable-relief only class.

B. The Named Petitioners Would Not Have Adequately Represented the Putative Class

To the extent the named Petitioners were willing to forego class certification on damages in order to pursue equitable only relief under Rule 23(b)(2), the Courts below determined that "it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members." (Pet. App. at 40a). Where an action is certified pursuant to Rule 23(b)(2), class members do not have the right to opt out in order to pursue their claims in an individual action. *See* Fed. R. Civ. P. 23(c)(2)(A)-(B); (Pet. App. at 367a) (under Rule 23(b)(2), "[c]lass members have no right to 'opt out'")). As a result, if the named Petitioners had dismissed their claims for monetary damages, the members of the putative class would have been precluded from recovering compensatory and punitive damages in the event the District Court had certified Petitioners' claims for equitable relief. *See Zachary v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999)

> [b]ecause there appears to be no clear cut right to opt out of a Rule 23(b)(2) class action, the named Plaintiffs are asking the class members being represented here to risk waiving their right to monetary damages solely so the action for disparate treatment can proceed as a class action . . . Given the discretionary nature of the

> class action rule, the Court is not willing to gamble away the proposed class members' potential rights to compensatory damages in this case.

Accordingly, the lower courts held that the named Petitioners would not have been adequate representatives the members of the class: "to many of the class members (and especially to those who no longer work for the defendants), the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate." (*See* Pet. App. at 40a).

Petitioners counter that this conclusion was in error because "[a]ctions seeking injunctive relief for class-wide discrimination fit squarely within Rule 23(b)(2), which is 'intended primarily to facilitate civil rights class actions.'" (*See* Pet. App. at 23) (quoting *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993 (5th Cir. 1981)). *Penson*, however, was decided *before* the Civil Rights Act of 1991, which "changed the landscape of employment discrimination law by making available compensatory and punitive damages (as well as the right to trial by jury) in Title VII cases." (Pet. App. at 41a n. 14). Indeed, Petitioners fail to cite a single case that was decided after the Civil Rights Act of 1991 to support their position that they could have adequately represented the interests of the putative class. (*See* Pet. App. at 22-24). Thus, Petitioners have not demonstrated that the District Court's desire to protect the class members' right to seek compensatory and punitive damages was an abuse of discretion.

C. Petitioners Completely Ignore the Lower Courts' Significant Seventh Amendment Concerns

Both the District Court and the Eleventh Circuit expressed concerns that the Seventh Amendment posed a significant obstacle to the certification of an "equitable relief-only" class. (*See* Pet. App. at 41a-42a, 371a-372a). Petitioners have made no effort to address these concerns — let alone demonstrate that it was an abuse of discretion for these reservations to have

influenced the District Court's decision. For this reason alone, Petitioners have not shown that the District Court abused its discretion by declining to certify an equitable relief-only class.

Further, it is clear that certifying an equitable relief-only class would have almost certainly violated the Seventh Amendment. The Reexamination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States other than according to the rules of the common law." U.S. Const. amend VII. Since Petitioners demanded a jury trial in this case, the parties were entitled under the Seventh Amendment to have all matters at law determined by a single jury *before* having decisions concerning equitable relief made by the trial court. *See Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970). Therefore, it would not have been possible to certify an equitable-relief only class (thereby deferring damages issues until resolution of liability) without running afoul of the Seventh Amendment. (*See* Pet. App. at 41a-42a).

Even if damage issues could be deferred until after the liability phase, it would still be necessary for a single jury to decide more than 2,000 individual claims for compensatory damages. (Pet. App. 41a-42a). In the District Court's judgment, "[t]he prospect of trying possibly two thousand of these claims before a single jury is simply absurd." (Pet. App. at 372a). Petitioners have made no effort to show how these logistical concerns constitute an abuse of discretion.

D. A So-Called "Catch 22" Does Not Exist in the Eleventh Circuit

In a last-ditch effort to persuade this Court that there are compelling reasons to grant the Petition, Petitioners contend that the Eleventh Circuit's analysis creates a "Catch-22" that "effectively eliminates class action discrimination cases in the Eleventh Circuit" under Rule 23(b)(2). (*See* Pet. App. at 22). Petitioners' argument, however, ignores the fact that Rule 23(b)(2) is not the only avenue for plaintiffs to pursue allegations

of class-wide discrimination. In this case, Petitioners also sought unsuccessfully certification under Rule 23(b)(3) — yet they do not contend that the District Court's denial of certification under Rule 23(b)(3) was an abuse of discretion. (*See* Pet. App. at 22-24, 372a). As a result, it is clear that a "Catch-22" does not exist within the Eleventh Circuit, and Petitioners therefore have not shown any compelling reasons for this Court to review this issue.

IV. *Desert Palace Has No Impact on this Case*

A. Petitioners Have Waived Their Argument that this is a Mixed-Motive Case

For the first time in the five-year history of this case, Petitioners claim that this is a "mixed-motive" case. (*See* Pet. App. at 24-25). Petitioners did not raise this contention before the District Court or the Eleventh Circuit. Therefore, Petitioners have waived this argument. *See United States v. Bean*, 537 U.S. 71, 75 n. 2 (2002) (holding argument was "waived" because it was "raised for the first time in his brief on the merits to this Court").[16]

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16. Even if Petitioners had not waived their argument that this is a mixed-motive case, Petitioners' only evidence in support of their misguided contention is that Respondents asserted a routine mixed-motive affirmative defense in their Answer. (*See* Pet. App. at 26). This affirmative defense does not become relevant, however, until the *plaintiff* presents evidence that a protected characteristic was a "motivating factor" in the unlawful employment practice. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *Salis v. University of Minnesota*, 408 F.3d 470, 475 (8th Cir. 2005) ("[m]ixed-motive cases are those in which a *plaintiff's evidence* shows that an employer's decision was motivated, at least in part, by discrimination") (emphasis added); *Bolander v. BP Oil Co.*, 128 Fed. Appx. 412, 418 (6th Cir. 2005) (finding case was "not a mixed motive case" because "there is no evidence to create an issue of fact whether age was a motivating factor in [defendant's] decision to terminate [plaintiff]"). In this case, Petitioners never presented evidence that race played a role in any of the employment decisions at issue. Therefore, it is clear that this is not a mixed-motive case.

B. *Desert Palace* Did Not Impact the *McDonnell Douglas* Framework

In the event this is not a mixed-motive case, Petitioners urge this Court to extend its decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003) to single-motive cases at the summary judgment stage. (*See* Pet. App. 25). In *Desert Palace*, this Court addressed the narrow issue of "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive [jury] instruction under 42 U.S.C. § 2000e-2(m)." 539 U.S. at 98. This Court held that direct evidence was not necessary to receive such a jury instruction. *Desert Palace*, 539 U.S. at 95-96.

From this narrow holding that relates solely to *jury instructions*, Petitioners extrapolate that the District Court somehow erred by not "imposing the burden on Respondents to demonstrate that they would have taken the same action without regard to the impermissible factor" at the *summary judgment* stage. (*See* Pet. App. at 27). Thus, Petitioners essentially contend that *Desert Palace* overruled this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) by transforming the defendant's burden at the summary judgment stage from a burden of production into a burden of persuasion. (*See id.*).

As the Eleventh Circuit held, Petitioners "read *Desert Palace* too broadly." (Pet. App. at 48a n. 17). Indeed, the plain language of *Desert Palace* demonstrates that this Court did not overrule or abrogate *McDonnell Douglas*. For instance, this Court expressly limited its holding to the mixed motive context: "[t]his case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context." *Desert Palace*, 539 U.S. at 91 n. 1. Further, this Court did not even *mention McDonnell Douglas* in *Desert Palace*. It is inconceivable that this Court would have overruled or even abrogated the "seminal" *McDonnell-Douglas* case without any discussion whatsoever. (Pet. App. at 48a n. 17). In addition, this Court relied on *Reeves*

v. Sanderson, which had employed the *McDonnell Douglas* framework. *See Desert Palace*, 539 U.S. at 100.

This conclusion is confirmed by the fact that this Court has repeatedly cited *McDonnell Douglas* with approval *after Desert Palace* was decided. *See, e.g., Johnson v. California*, 125 S. Ct. 2410, 2418 n. 7 (2005). In fact, this Court has conclusively reaffirmed that the defendant has a burden of production — not persuasion — at the summary judgment stage under the "familiar" *McDonnell Douglas* analysis:

> [u]nder *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to *articulate* a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating the employer's explanation is pretextual.

See Raytheon Co. v. Hernandez, 540 U.S. 44, 50 n. 3 (2003) (citing *McDonnell Douglas*, 411 U.S. at 802) (emphasis added). This analytical framework is identical to the burden-shifting framework the courts below used in this case. (*See, e.g.*, Pet. App. at 47a-49a; 237a-239a). Accordingly, the District Court applied the correct legal standard in analyzing Petitioners' individual claims.

C. Adopting Petitioners' Proposed Analytical Framework Would Not Change the Outcome of this Case

According to Petitioners, the following analytical framework is applicable at the summary judgment stage in the wake of *Desert Palace*:

> *Desert Palace* applies whenever there is evidence of alternative motives so that the finder of fact could believe either or both parties as to the defendant's

> motive. *If the plaintiff proffers evidence that race played a role*, and the defendant puts in evidence that the plaintiff had a bad attitude, the jury could believe either, or could believe that both factors played a role.

(*See* Pet. App. at 27) (emphasis added). Adopting Petitioners' proposed framework, however, would not change the outcome of this case because Petitioners never proffered a shred of evidence that race was a motivating factor in any of the employment decisions at issue. Indeed, Petitioners have made no effort to point to any such evidence in the record. Thus, Petitioners' argument should be rejected for this additional reason.

D. No Circuit Court Has Found that *Desert Palace* Altered *McDonnell Douglas*

Finally, Petitioners' contention that the lower courts are in "disarray" over the impact of *Desert Palace* on *McDonnell Douglas* is simply not true. No Circuit has held that *Desert Palace* altered *McDonnell Douglas* in any way. To the contrary, the Circuits have repeatedly reaffirmed that *Desert Palace* has no impact on the *McDonnell Douglas* framework.[17] *See, e.g.*, *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005) ("*Desert Palace* really has no direct impact in the

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17. In fact, *every* Circuit has applied the traditional *McDonnell Douglas* analytical framework since *Desert Palace* was decided. *See, e.g.*, *Hillstrom v. Best Western TLC Hotel*, No. 03-1972, 2003 WL 23095252, **3-4 (1st Cir. Dec. 31, 2003); *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003); *Taylor v. Cherry Hill Bd. Of Educ.*, No. 02-3738, 2004 WL 52083, *4 (3rd Cir. Jan. 13, 2004); *Bryant v. Aiken Regional Med. Centers, Inc.*, 333 F.3d 536, 544-45 (4th Cir. 2003); *Read v. BT Alex Brown, Inc.*, 72 Fed. Appx. 112, 115 (5th Cir. 2003); *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003); *Cerutti v. BASF Corp.*, 349 F.3d 1055, 1061 (7th Cir. 2003); *Trammel v. Simmons First Bank*, 345 F.3d 611, 614 (8th Cir. 2003); *Peterson v. Hewlett-Packard Co.*, No. 01-35795, 2004 WL 26580, *3 (9th Cir. Jan. 6, 2004); *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003); *Porter v. Natsios*, 414 F.3d 13, 18 (D.C. Cir. 2005).

summary judgment context"); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) ("*Desert Palace* has no effect on pretext cases under *McDonnell Douglas*"). Moreover, while a minority of district courts has held that *Desert Palace* altered the traditional *McDonnell Douglas* test, the vast majority of District Courts continue to apply the *McDonnell Douglas* analysis. For these reasons, Petitioners have not carried their burden of demonstrating that the Eleventh Circuit's Opinion conflicts with a decision of this Court or a Court of Appeals or that it implicates an important question of federal law that has not been settled.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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